82-1598

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

NO. _____

GARY VAUGHAN,

PETITIONER

V.

STATE OF NORTH CAROLINA

RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

JAMES M. LUDLOW, JR.
ATTORNEY FOR PETITIONER
P.O. Box 1611
DURHAM, NC 27702
TEL. (919) 682-5403

WORDS by Dorothy, 303 FUNB Bldg., Durham, NC 27702
Tel. (919) 683-WORD

QUESTIONS PRESENTED

1. Did the failure of the trial court to include in its instructions to the jury, a portion of the North Carolina Pattern Jury Instructions clearly allocating the Burden of Proof on the issue of Self-Defense, violate the Petitioner's right to the Due Process of Law as established by this court in Mullaney v. Wilbur and Taylor v. Kentucky?

2. Did the failure of the Trial Court to include in its instructions to the jury, a portion of the North Carolina Pattern Jury Instructions clearly allocating the Burden of Proof on the issue of Self-Defense to the State, violate the Petitioner's right to equal protection of the laws as set forth in the Fourteenth Amendment to the United States Constitution?

INDEX

Table of Contents — Page

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No. _____

GARY VAUGHAN,

Petitioner

vs.

STATE OF NORTH CAROLINA,

Respondent

ON WRIT OF CERTIORARI

TO THE NORTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Petitioner Gary Vaughan respectfully prays that a Writ of Certiorari issue to review the Judgment of the North Carolina Supreme Court entered on January 31, 1983.

OPINIONS BELOW

The Order denying petition for discretionary review entered by the North Carolina Supreme Court is reproduced as Appendix A-3.

The Opinion of the North Carolina Court of Appeals is reported at N.C. App. 296 S.E.2d 516 and is reproduced as Appendix A-4.

JURISDICTION

The Order of the Supreme Court of North Carolina denying the petitioner's Petition For Discretionary Review was entered on January 31, 1983. This Petition For Certiorari was filed within 60 days of that date. This Court's Jurisdiction is invoked under 28 U.S.C. § 2101(d) [Appendix A-1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within any jurisdiction the equal protection of the laws.

United States Code

28 U.S.C. § 2101 [See Appendix A-1]

STATEMENT OF THE CASE

The Petitioner was convicted, after trial by Jury, of the Offense of Second Degree Murder during the July 20, 1981, Criminal Session of the Superior Court of Guilford County, N.C. The trial and verdict came shortly after a lengthy trial in the same judicial district (referred to as the "Klan-Nazi Murder Case" in the national media) which had resulted in the acquittal of several Ku Klux Klan members and symphathizers

who had allegedly murdered several members of the Communist Workers Party.

Conflicted evidence relating to the issue of self-defense was presented at Trial and the Trial Judge, in charging on self-defense did not state the Law of Self-Defense as outlined in the North Carolina Pattern Jury Instructions [App. p. A-9 and App. p. A-18]. This matter was raised by counsel in his brief to the North Carolina Court of Appeals. In fact, the issue of the correctness of the court's instruction was the sole basis for review.

The North Carolina Court of Appeals, in an opinion dated November 2, 1982 and reported at 296 S.E.2d 516 [App. p. A-4] determined that none of the Petitioners constitutional rights had been violated by the court's instructions and allowed the verdict to stand.

The Petitioner then petitioned the North Carolina Supreme Court For Discretionary Review. Said petition was denied in an order dated January 31, 1983.

REASONS FOR GRANTING THE WRIT

1. Did the failure of the trial court to include in its instructions to the jury, a portion of the North Carolina Pattern Jury Instructions clearly allocating the Burden of Proof on the issue of self defense, violate the Petitioner's right to the Due Process of Law as established by this court in Mullaney v. Wilbur and Taylor v. Kentucky?

Following the landmark decision of this court in Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 508, 95 S. Ct. 1881, many states, among them North Carolina, rewrote their pattern jury instructions in an effort to conform to that decision.

A copy of the North Carolina Pattern Jury Instructions relating to self-defense is included in the appendix [App. p. A-17]. The language clearly places upon the State the burden of proving that the Defendant did not act in self-defense as was mandated by the Mullaney decision. In particular your petitioner wishes to point out that portion of the N.C. Pattern Jury Instructions which reads as follows:

MANDATE

> If, however, you are satisfied beyond a reasonable doubt that *(name defendant)* committed *(name offenses, including appropriate lesser included offenses)*[4] you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that *(name defendant)* did not act in self-defense, that is, that *(name defendant)* did not reasonably believe that the assault was necessary or apparently necessary to protect himself from death or serious bodily injury, or that he *(name defendant)*, used excessive force, or was the aggressor. If you do not so find or have a reasonable doubt, then *(name defendant)* would be justified by self-defense and it would be your duty to return a verdict of not guilty.

This portion of the N.C. Pattern Jury Instructions is normally the last statement made to the jury in defining self-defense. The language is much clearer and much stronger than merely stating that the State has the burden of proving that the Defendant did not act in self-defense. In your petitioner's case, while the trial judge stated several times that the State had the burden of proving that the petitioner had not acted in self-defense, he nonetheless totally omitted the above-quoted portion of the Instructions. Your petitioner respectfully contends that omitting this language failed to

adequately place the burden of proof on the State to disprove that he acted in self-defense.

This contention becomes all the clearer when the two charges are actually compared with one another side by side. Upon examination, it becomes apparent as well that the Trial Judge also failed to charge the jury that the Petitioner would not be guilty of any crime if he did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

The Trial Judge's instructions, while they mention several times that the State has the burden of proving that the Defendant did not act in self-defense simply do not have the impact that a straight application of the N.C. Pattern Jury Instructions would have had. In this respect, this case is very similar to the holding of this Court in Taylor v. Kentucky 436 U.S. 478, 56 L. Ed. 2d 468, 98 S. Ct. 1930. In Taylor, a state trial judge had repeatedly stated that the State had the burden of proving the defendant's guilt beyond a reasonable doubt, yet he failed to state at all that the defendant was presumed innocent of the charge until proven guilty. This court regarded that presumption of innocence as so important a concept that failure to mention this pattern instruction is warranted reversal despite the fact that the trial judge placed the burden of proof on the State in his instructions to the jury. Your petitioner respectfully contends that he has an analagous situation to that decided in Taylor. It goes without question that the concept of self-defense is an important one, one as significant in your petitioner's view as the presumption of innocence. For that reason, the Trial Court should do everything possible to firmly establish in the minds of the jury that the burden is not on the Defendant to establish his innocence. The

omitted portions of the N.C. Pattern Jury Instructions readily at hand and available to the judge at the time of his charge would clearly have placed this burden properly on the State. Your petitioner is not here simply on a question of semantics. These were substantial omissions which deprived him of a fundamental right.

2. Did the failure of the Trial Court to include in its instructions to the jury, a portion of the North Carolina Pattern Jury Instructions clearly allocating the Burden of Proof on the issue of Self-Defense to the State, violate the Petitioner's right to equal protection of the laws as set forth in the Fourteenth Amendment to the United States Constitution?

It is a matter of no small irony that the instructions to the jury in virtually every North Carolina case begin with the following admonition from the North Carolina Pattern Jury Instructions:

> "It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or as you might like it to be. This is important because justice requires that everyone tried for the same crime be treated in the same way and have the same law applied. (Emphasis ours)

The irony of such a statement lies in the fact that in many cases, such as your Petitioner's, everyone is not treated in the same way and does not have the same law applied. As your Petitioner has already pointed out, substantial portions of the North Carolina Pattern Jury Instructions were omitted from the charge given the jury in his case. Your petitioner has previously contended that those omissions denied him the Due Process of Law and we need not restate those contentions here.

Pattern jury instructions were adopted for the most part to insure that everyone tried for the same offense should have the same law applied to him. Certainly, a defendant cannot expect exactly the same conditions in a trial as other defendants similarly situated. He cannot expect the same type of jury or jury panel, the same type of public environment, the same skill of judge, prosecutor or defense attorney--these are variables subject to much change no matter how diligently the system of justice tries to achieve an absolute sameness. However, a defendant charged with a crime has a perfect right to expect that where the system has been provided with the means to achieve uniformity--such as where pattern jury instructions have been drawn--that his jury will receive the same instructions as others similarly situated have.

In the present case, your Petitioner did not receive the benefit of the pattern jury instructions relating to self defense. Undoubtedly, other defendants have received these instructions--to their benefit or detriment--but at least they have received them. In your petitioner's opinion, he was thus deprived of the Equal Protection of the Law.

CONCLUSION

For the reasons set forth herein, your Petitioner respectfully requests that the Petition For a Writ of Certiorari be granted.

Respectfully submitted this _____ day of March, 1983.

James M. Ludlow, Jr.
Attorney for Petitioner
First Union Bank Building
Durham, N.C. 27701

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Writ of Certiorari has been duly served upon the Attorney General of the State of North Carolina by forwarding a copy to:

Alfred N. Salley
Assistant Attorney General
State of North Carolina
Suite 207
20 S. Spruce Street
Asheville, North Carolina 28801

This the _____ day of March, 1983.

James M. Ludlow, Jr.
Attorney for Petitioner
First Union Bank Building
Durham, N.C. 27701

APPENDIX

28 U.S.C. § 2101(d)

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title [28 USCS §§ 1252, 1253, 2282], holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before

judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(June 25, 1948, c. 646, § 1, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104.)

No. 633P82 Eighteenth District

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)
	) ORDER DENYING PETITION
v	) FOR DISCRETIONARY
	) REVIEW
GARY T. VAUGHAN	) (8218SC185)
	)

****

Upon cosideration of the petition filed in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 28th day of January 1983.

s/ Martin, J.
For the Court"

Therefore, the temporary stay entered on 16 November 1982 is hereby dissolved.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31st day of January 1983.

s/GREGORY WALLACE
Clerk of the Supreme Court

Copy to:

North Carolina Court of Appeals
John R. Morgan, Attorney at Law
Alfred N. Salley, Assistant Attorney General
Lamar Dowda, District Attorney
James Lee Knight, Clerk of Superior Court

NO. 8218SC185

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 1982

STATE OF NORTH CAROLINA

v.

Guilford County
No. 80CRS39829

GARY T. VAUGHAN

Appeal by defendant from Freeman, Judge. Judgment entered 23 July 1981 in Superior Court, Guilford County. Heard in the Court of Appeals 21 September 1982.

Defendant was indicted for the murder of Paul Autry. He pleaded not guilty and was tried for second degree murder.

State's evidence tended to show that on the afternoon on 12 July 1980 the defendant got into an argument with someone at the Hilltop Lounge. Danny Smith, a member of the Rebel Rousers Motorcycle Club, interceded and told defendant "if he had anything to say to say it to me." The argument ended. The defendant got a shotgun out of his car trunk, laid it on the back seat, and drove away. That night Danny Smith, Paul Autry, and two other members of the motorcycle club went to another bar, the Pinwheel Lounge in Greensboro, North Carolina. The defendant arrived, and an argument began between defendant and Danny Smith. Autry, the sergeant-at-arms of the Rebel Rousers, approached the two men and asked what was going on. He told defendant to "take it outside." The defendant pulled a gun and started shooting. Smith and several others wrestled defendant to the floor and disarmed him. Autry was shot, and he subsequently died from gunshot wounds to his chest.

The defendant's evidence tended to show that following the argument at the Hilltop Lounge, Danny Smith stated that he and the others were going to the Pinwheel Lounge to settle things with the defendant once and for all. Smith, Autry and the other club members were armed wth guns and knives. Witnesses testified that they saw Autry reach behind his back just before the shooting as if he were reaching for a gun. A gun was subsequently found on the floor near Autry's body. Defendant also presented evidence that Autry had a reputation for violence.

Defendant was convicted of second degree murder and was sentenced. Defendant appeals the judgment entered against him.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Public Defendant Wallace C. Harrelson, by Assistant Public Defender Hugh Davis North, for defendant-appellant.

HILL, Judge.

Defendant presents two arguments on appeal. Both concern the trial court's charge on the law of self-defense. Defendant relies upon State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981), in which Justice Huskins gave the following statement of the law in this area:

> The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

(Citations omitted.) The existence of these four elements gives the defendant a perfect right of self-defense and requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well.

On the other hand, if defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the imperfect right of self-defense, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter. (Citations omitted.)

303 N.C. at 530, 279 S.E.2d at 572-73.

Defendant's first argument relates to the charge on perfect self-defense. The trial court instructed on the four elements set forth in Norris. As to the fourth element, the court stated, "The fourth thing that applies to self-defense is that the defendant did not use excessive force; that is, more force than reasonably appeared to be necessary to the defendant at the time." Defendant argues that the judge should have defined excessive force as "more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm." Specifically, defendant contends that by omitting the phrase in italics the judge reduced the State's burden of proof and deprived him of the full benefit of the law. We cannot agree. There is no required formula for an instruction to the jury. State v. Wilkins, 34 N.C. App. 392, 399, 238 S.E.2d 659, 664, disc. rev. denied, 294 N.C. 187, 241 S.E.2d 516 (1977). The trial court is not required to adopt the very words used by an appellate opinion in setting forth the law on a particular subject. The charge is to be construed as a whole; and "[i]f, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded." State v. Williams, 299 N.C. 652, 660, 263 S.E.2d 774, 779-80 (1980). In the present case, we find no error in the instruction on the fourth element of perfect self-defense. The importance of the fourth element is that the force used not be excessive, and we believe that the trial court's instruction adequately conveyed this meaning. The instruction is substantially as set forth in Norris, and we overrule this assignment of error.

By his second argument, the defendant contends that the trial court failed to follow the guidelines of Norris in the charge on imperfect self-defense. Defendant particularly objects to the court's definition of voluntary manslaughter and argues that the judge should have instructed in the language of Norris. We have examined the instruction given by the court and find no error. The court herein instructed, "[I]f the State proves beyond a reasonable doubt that the defendant, although otherwise acting in self-defense, used excessive force or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter." Our Supreme Court recently found this very language to be adequate in a case in which the defendant appellant relied on Norris. State v. Cooke, 306 N.C. 117, 291 S.E.2d 649 (1982). In light of Cooke, we overrule this argument.

In the Defendant's trial we find

No Error.

Judges HEDRICK and ARNOLD concur.

JURY INSTRUCTION OF TRIAL COURT

In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant, as compared to that of Paul Autry, whether or not Paul Autry had a weapon in his possession, and the reputation, if any, of Paul Autry for danger and violence. And the third thing you would be required to find to apply self-defense is that the defendant was not the aggressor. If he voluntarily and without provocation entered the fight, he was the aggressor. One enters a fight voluntarily if he uses toward his opponent such abusive language which, considering all of the circumstances, is calculated and intended to bring on a fight. The fourth thing that applies to self-defense is that the defendant did not use excessive force; that is, more force that reasonably appeared to be necessary to the defendant at the time. Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to him at that time.

[So, I would charge that if you find from the evidence and beyond a reasonable doubt that on or about the 13th day of July, 1980, the defendant, Gary Vaughan, intentionally, and with malice, and without justification or excuse, shot Paul Autry with a .22 caliber pistol, and that that shot thereby proximately caused Paul Autry's death, it would be your duty to return a verdict of guilty of second degree murder.]

However, if you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of second degree murder.

If you do not find the defendant guilty of second degree murder, you must consider whether

he is guilty of voluntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the 13th day of July, 1980, Gary Vaughan intentionally, and without justification or excuse, shot Paul Autry with a .22 caliber pistol, and thereby proximately caused Paul Autry's death, you would return a verdict of guilty of voluntary manslaughter.

Such a finding on your part would mean that the State has failed to prove beyond a reasonable doubt that Gary Vaughan acted with malice.

You would return a verdict of guilty of voluntary manslaughter if you find beyond a reasonable doubt that Gary Vaughan intentionally shot Paul Autry with a .22 caliber pistol, and thereby proximately caused Paul Autry's death, even if the State has not proved beyond a reasonable doubt that Gary Vaughan did not act in self-defense, provided that the State has proved beyond a reasonable doubt that in the exercise of self-defense Gary Vaughan used excessive force or was the aggressor, although without murderous intent in bringing on the affray with Paul Autry.

[However, if you do not find beyond a reasonable doubt that Gary Vaughan intentionally shot Paul Autry with a .22 caliber pistol, or that such shooting was a proximate cause of Paul Autry's death, you will not return a verdict of guilty of voluntary manslaughter. It would be your duty to return a verdict of not guilty.]

Now, members of the jury, you have heard all of the evidence, you have heard the arguments of the attorneys for the State of North Carolina and for the defendant.

The Court has certainly not summarized all of the evidence. But it is your duty to remember

all of the evidence, whether it has been called to your attention or not. And if your recollection of the evidence differs from that of mine or that of the attorneys, you are to rely solely upon your recollection of the evidence in your deliberations.

I have not reviewed the contentions of the State or the defendant that was given in their arguments. But it is your duty not only to consider all of the evidence but also the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to that of the victim, Paul Autry, whether or not Paul Autry had a weapon in his possession, and the reputation, if any, of Paul Autry for danger and violence. The third thing, that the defendant was not the aggressor. If he voluntarily and without provocation entered the fight, he was the aggressor. [Fourth, that the defendant did not use excessive force; that is, more force than reasonably appeared to be necessary to the defendant at the time.] Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to him at that time.

Now, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. Now, if the State proves beyond a reasonable doubt that the defendant, although otherwise acting in self-defense, used excessive force or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter.

[Let me repeat that. That is to say if the State proved to you beyond a reasonable doubt

that the defendant, though otherwise acting in self-defense, used excessive . . .

. . . Now, if the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Paul Autry with a deadly weapon or intentionally inflicted a wound upon Paul Autry with a deadly weapon that proximately caused his death, you may infer: First, that the killing was unlawful, and; second, that it was done with malice, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. If the killing was unlawful and done with malice, the defendant would be guilty of second degree murder.

[Now, voluntary manslaughter is the unlawful killing of a human being without malice.]

A killing would be excused entirely on the ground of self-defense if: First, it appeared to the defendant and he believed it to be necessary to shoot Paul Autry in order to save himself from death or great bodily harm, and; second, circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at that time.

(JURORS KNOCK ON THE DOOR AND NOTIFY THE BAILIFF THEY HAVE A QUESTION AT 3:45 P.M.)

(DEFENDANT AND COUNSEL ARE PRESENT IN THE COURTROOM)

THE COURT: I believe the jury has a question?

MR. REARDON: Yes sir.

THE COURT: Will you bring them back in, please?

(JURORS RETURN TO THE COURTROOM)

THE COURT: Who is the foreman of this jury?

JUROR NO. 3: I am, Your Honor.

THE COURT: State your name, please?

JUROR NO. 3: Granville Pruitt.

THE COURT: You have a queston? Could you state that question?

MR. PRUITT: Yes, Your Honor. We seem to have a little disagreement on the way you advised us between first degree and second -- or manslaughter, rather. And we were wondering if you could go back over that again with us.

THE COURT: Thank you. You may have a seat.

Now, members of the jury, second decree murder is the unlawful killing of a human being with malice.

[Volunary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.]

I would charge you that for you to find the defendant guilty of second degree murder, the State must prove two . . .

. . . Now I say to you that if the State proves beyond a reasonable doubt or has admitted that the defendant intentionally killed Paul Autry with a deadly weapon or intentionally inflicted a wound upon Paul Autry with a deadly

weapon that proximately caused his death, you may infer: First, that the killing was unlawful, and; second, that it was done with malice, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. If the killing was unlawful and done with malice, the defendant would be guilty of second degree murder.

[Voluntary manslaughter is the unlawful killing of a human being without malice.]

Let me explain again the instructions on self-defense.

A killing, whether second degree murder or voluntary manslaughter, would be excused entirely on the ground of self-defense if: First, it appeared to the defendant and he believed it to be necessary to shoot Paul Autry in order to save himself from death or great bodily harm, and; second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you, the jury, to determine the reasonableness of the defendant's belief from . . .

. . . In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant, as compared to that of Paul Autry, whether or not Paul Autry had a weapon in his possession, and the reputation, if any, of Paul Autry for danger and violence. And the third thing you would be required to find to apply self-defense is that the defendant was not the aggressor. If he voluntarily and without provocation entered the fight, he was the agressor. One enters a fight voluntarily if he uses toward his opponent such abusive language which, considering all of the cir-

cumstances, is calculated and intended to bring on a fight. [The fourth thing that applies to self-defense is that the defendant did not use excessive force; that is, more force than reasonably appeared to be necessary to the defendant at the time. Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to him at that time.

[Now, the burden is on the State of North Carolina to prove beyond a reasonable doubt that the defendant did not act in self-defense. However, if the State proves beyond a reasonable doubt that the defendant, though otherwise acting in self-defense, used excessive force or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter.]

. . . the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to that of the victim, Paul Autry, whether or not Paul Autry had a weapon in his possession, and the reputation, if any, of Paul Autry for danger and violence. The third thing, that the defendant was not the aggressor. If he voluntarily and without provocation entered the fight, he was the aggressor. [Fourth, that the defendant did not use excessive force; that is, more force than reasonably appeared to be necessary to the defendant at the time.] Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to him at that time.

Now, the burden is on the State to prove beyond a reasonable doubt that the defendant did

not act in self-defense. Now, if the State proves beyond a reasonable doubt that the defendant, although otherwise acting in self-defense, used excessive force or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter.

[Let me repeat that. That is to say if the State proved to you beyond a reasonable doubt that the defendant, though otherwise acting in self-defense, used excessive force or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter.]

So, I guess I would finally charge you that if you find from the evidence beyond a reasonable doubt that on or about the 13th day of July, 1980, the defendant, Gary Vaughan, intentionally and with malice, and without justification or excuse, shot Paul Autry with a .22 caliber pistol, thereby proximately causing Paul Autry's death, it would be your duty to return a verdict of guilty of second degree murder.

However, if you have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of second degree murder.

If you do not find the defendant guilty of second degree murder, you would then consider whether he is guilty of voluntary manslaughter.

[If you find from the evidence beyond a reasonable doubt that Gary Vaughan intentionally shot Paul Autry with a .22 caliber weapon and thereby caused his death, even if the State has not proved beyond a reasonable doubt that Gary Vaughan did not act in self-defense, provided that the State has proved beyond a reasonable

doubt that in the exercise of self-defense Gary Vaughan used excessive force or was the aggressor, although without murderous intent in bringing on the affray with Paul Autry, then you would find the defendant guilty of voluntary manslaughter.]

However, if you do not find beyond a reasonable doubt that Gary Vaughan intentionally shot Paul Autry with a .22 caliber pistol, and that that was a proximate cause of Paul Autry's death, you would not return a verdict of guilty of voluntary manslaughter.

If the State has failed to prove beyond a reasonable doubt that Gary Vaughan did not act in self-defense, and has likewise failed to prove beyond a reasonable doubt that he used excessive force or was the aggressor, it would be your duty to return a verdict of not guilty.

Do you feel like that clarified it?

N.C.P.I.--Crim 308.45

SELF-DEFENSE--ALL ASSAULTS INVOLVING DEADLY FORCE.[1]

Note Well: This charge is intended for use with N.C.P.I.--Crim. 208.09, 208.10, 208.15, 208.25, 208.50, 208.55, 208.60, and 208.85

If the defendant acted in self-defense, his actions are excused and he is not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in self-defense.

If you find from the evidence beyond a reasonable doubt that the defendant assaulted *(name victim)* and in so doing used deadly force, that is, force likely to cause death or great bodily harm, that assault would be excused as being in self-defense only if the circumstances at the time he acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary or apparently necessary to protect himself from death or great bodily harm, and the circumstances did create such belief in the defendant's mind.[2] It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time.

However, the force used cannot have been excessive. This means that the defendant had

---

[1]Deadly force is any force likely to cause death or great bodily injury. S. v. Clay, 297 N.C. 555, 563 (1979).

[2]This instruction is intended to cover the rule of law that action in self-defense need only be apparently, not actually, necessary. *See, e.g.*, State v. Jennings, 276 N.C. 157 (1970).

the right to use only such force as reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, (including the size, age and strength of the defendant as compared to *(name victim)*, (the fierceness of the assault, if any upon the defendant), (whether or not *(name victim)* had a weapon in his possession), (and the reputation, if any, of *(name victim)* for danger and violence). Again, it is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time.

Furthermore, self-defense is an excuse only if the defendant himself was not the aggressor. If he voluntarily entered into the fight, he was the aggressor unless he thereafter attempted to abandon the fight and gave notice to his opponent that he was doing so. (One enters a fight voluntarily if he uses toward his opponent abusive language which, considering all of the circumstances, is calculated and intended to bring on a fight.)

(Note Well: If the defendant used a weapon which is a deadly weapon "per se," do not give the following paragraph, or the paragraph on page 4. If the weapon is not a deadly weapon per se, give the following paragraph, and the paragraph on p. 4. State v. Clay, 297 N.C. 555, 566 (1979).

(If you find from the evidence beyond a reasonable doubt that the defendant assaulted but do not find that he used a deadly weapon or other deadly force, that assault would be excused as being in self-defense if the circumstances at the time he acted were such as would create in the mind of a person of ordinary

firmness a reasonable belief that the action was necessary or apparently necessary to protect himself from bodily injury or offensive physical contact, and the circumstances did create such belief in the defendant's mind--even though he was not thereby put in actual danger of death or great bodily harm; however, the force used cannot have been excessive. Furthermore, self-defense is an excuse only if the defendant himself was not the aggressor.)

MANDATE[3]

If, however, you are satisfied beyond a reasonable doubt that *(name defendant)* committed *(name offense, including appropriate lesser included offense)*[4] you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that *(name defendant)* did not act in self-defense, that is, that *(name defendant)* did not reasonably believe that the assault was necessary or apparently necessary to protect himself from death or serious bodily injury, or that he *(name defendant)*, used excessive force, or was the aggressor. If you do not so find or have a reasonable doubt, then *(name defendant)* would be justified by self-defense and it would be your duty to return a verdict of not guilty.

---

[3]Including self-defense in the mandate is required by State v. Woodson, 31 N.C. App. 400 (1976). Cf. State v. Dooley, 285 N.C. 158 (1974).

[4]Name all offenses which involve the use of deadly force.